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InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Defendant.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Third-Party Plaintiff,

v.

Case No. CV-03-450-E-LMB

DEFENDANT/THIRD-PARTY
PLAINTIFF'S REPLY IN SUPPORT OF
MOTION AND APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
(Misner Noncompete)

DEFENDANT/THIRD-PARTY PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF
MOTION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER (MISNER
NONCOMPETE) - 1

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POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; PORTER SUTTON, individually; ERNEST SUTTON, individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

I. INTRODUCTION

In opposition to InterDent Service Corporation's ("ISC") motion for a TRO, third-party defendant Larry Misner, Jr. ("Misner") concedes that he is in breach of the provision of his Noncompete Agreement (the "Agreement") with ISC's predecessor, GMS Dental Group Management, barring him from practicing within a 20 mile radius of Pocatello Dental Group ("PDG") practice located in the Pine Ridge Mall at 4155 Yellowstone Avenue, Pocatello, for two years after leaving the group: "Misner does not dispute InterDent's factual allegation that he (Misner) has decided to continue his practice of dentistry in association with [former PDG employee-dentist] Dr. Larry Bybee at 'Kidds Dental' located at 716 Yellowstone Avenue in Pocatello Idaho." (Misner's Opposition Memorandum at 6.) PDG's president, third-party defendant Dr. Gregory Romriell, testified in deposition that the effect of Misner's conduct "absolutely would be devastating" to ISC's business in Pocatello. (Deposition of Gregory E. Romriell ("Romriell Depo.") at 55.)¹ These concessions establish ISC's probability of success

¹ Cited excerpts of the Romriell Depo. are attached as Exhibit 1 to the Reply Affidavit of Scott J. Kaplan in Support of Defendant/Third-Party Plaintiff's Motion and Application for a Temporary Restraining Order ("Kaplan Reply Aff.").

on the merits and show irreparable harm if ISC is not granted a TRO. Everything argued by Misner—and he offers only argument, not a single item of evidence—is therefore a non sequitur.

Misner's attempts at misdirection and ISC's simple response can be easily summarized. *First*, Misner argues that Misner is not competing with ISC and that his competitor, PDG, has no objection to Misner breaching his contract with ISC. This is precisely why ISC's predecessor required Misner to enter into a direct noncompete agreement when it paid Misner and the other PDG shareholders \$2.8 million in 1996: because the remaining PDG shareholders would be indifferent to Misner's breach (they still get approximately 38 percent of their net collections), while ISC would have to cover almost the same level of administrative expenses minus the revenue Misner was generating. As PDG's president explained, Misner's leaving "wouldn't hurt the Pocatello Dental Group, it would hurt InterDent," an injury that Dr. Romriell, again, characterized as absolutely devastating "not to the Pocatello Dental Group but to InterDent." (Romriell Depo. at 55.)

Second, Misner characterizes ISC as a "third-party beneficiary of an agreement between an employer and an employee." (Misner Opposition at 5.) ISC agrees that it is a third-party beneficiary of Misner's employment agreement with PDG, but *ISC has not moved for a TRO based upon Misner's employment agreement, rather its motion is based on the direct contractual noncompete between ISC and Misner.* This noncompete was signed in the context of Misner's sale of his nonprofessional practice assets to ISC for large sums of money. Among these assets were the space and equipment of the practice in the Pine Ridge Mall in Pocatello. The value of these assets are obviously reduced by Misner's competing just down the street.²

² This point also covers Misner's third and fourth arguments on pp. 5-6 of its brief, which are the same contention rephrased in various ways.

Finally, Misner, perhaps because he has a preexisting dental office in Burley, Idaho (outside the noncompete area) offers no evidence of any harm or damage should the TRO be granted. The reason for this is that he could merely continue his practice in Burley where he had been working prior to June 11, 2004 and still works part time. (Deposition of Larry W. Bybee ("Bybee Depo.") at 14-15.)³ Consequently, ISC's motion should be granted without the necessity of a bond or, failing that, a bond at a very low level.

II. ARGUMENT

ISC will organize its reply memo by the elements of the showing it has made entitling it to a TRO: probability of success on the merits and irreparable injury.

A. **Probability of Success on the Merits: ISC is Entitled to Enforce Its Direct Noncompete with Misner**

Misner does not dispute that noncompete agreements are generally enforceable in Idaho. *See, e.g., Marshall v. Covington*, 81 Idaho 199, 206, 339 P.2d 504, 506 (1959) (enforcing physician noncompete). Noncompetes are particularly appropriate where, as the Idaho Supreme Court explained in *Marshall*, a "purchaser of a business may be entitled to protection against mere competition by his vendor." *Id.* at 203. Contrary to Misner's contention that there is a lack of authority supporting ISC's contentions on the merits, there are numerous cases enforcing noncompete agreements against the seller of business assets. As the Restatement (Second) of Contracts § 188, comment f (1981) explains that, in these circumstances, "in effect, the seller promises not to act so as to diminish the value of what he sold." *See also Rent-a-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 600 (9th Cir. 1991) ("[w]hen deciding what is reasonable, courts give greater deference to restrictions that are part of the sale

³ Cited excerpts of the Bybee Depo. are attached as Exhibit 2 to the Kaplan Reply Aff.

of a business than to restrictive covenants between employers and employees”); *McCandless v. Carpenter*, 123 Idaho 386, 391 n. 6, 848 P.2d 444 (1993) (sale of business valid consideration for a noncompete agreement); *Shakey's Inc. v. Martin*, 91 Idaho 758, 764, 430 P.2d 504 (1967) (same); cf. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n. 3 (1988) (“the classic [enforceable] ‘ancillary’ restraint is an agreement by the seller of a business not to compete in the market.”)

In contrast to all this authority, Misner relies only on dicta in a trespass case, a case not involving noncompete agreements, *Morrison v. Young*, 136 Idaho 316, 318, 32 P.2d 1118 (2001). Even the 1952 case cited in dicta in *Morrison*, *Worlton v. Davis*, 73 Idaho 217, 249 P.2d 810 (1952), is distinguishable. In *Worlton* physicians formed a partnership with a nonphysician and attempted to enforce a noncompete agreement against one of their physician employees. The court found the entire arrangement to be unlawful both because of the unlicensed individual in the partnership and because the unlicensed individual was the plaintiff’s employer. 73 Idaho 221-223. Here, PDG was Misner’s employer, not ISC. PDG and ISC have an independent contractor relationship, not a partnership. (See Management Agreement § 3.3.)⁴

Misner nonetheless professes to find something unusual about the fact that when he received \$400,000 from ISC’s predecessor for the sale of his nonprofessional assets, the company paying him this sum would want to contractually limit Misner’s ability to open a competing practice down the street. Of course, Misner took the money and signed the noncompete agreement and so apparently wants to have his cake and eat it too by retaining the funds but ignoring the noncompete. However, the economic realities of the parties’

⁴ Attached as Exhibit 1 to ISC’s Amended And Supplemental Answer, Counterclaims And Third-Party Complaint.

circumstances demonstrate why ISC's predecessors required Misner to sign the contract he now wants to disregard and why there is nothing extraordinary about it.

As the Court may recall from the previous briefing in this case, the PDG dentists are paid solely on the basis of a percentage of their collections (approximately 38 percent). Neither Pocatello Dental Group nor its shareholders pay the fixed costs of running the office. These are paid by ISC. (Romriell Depo. at 99.) Thus, when a revenue-producing dentist like Dr. Misner leaves, the pocketbooks of the remaining PDG dentists may be unaffected. (Romriell Depo. at 54-55.) ISC however, must absorb nearly the same costs without the revenue, at least \$1.3 million, generated by Misner's practice. (See Bybee Depo. at 35 (revenue from Misner's practice).)⁵

This explains why, despite knowledge of the harm that Dr. Misner's leaving would do, PDG took no action to enforce the noncompete agreement (also two years and 20 miles in scope) in Misner's employment agreement with PDG. (Romriell Depo. at 52-53, 62-62.) PDG disregarded Misner's breach of his noncompete despite the fact that the twenty mile and two-year scope of Dr. Misner's noncompete agreement with ISC was not in fact something ISC came up with: it had been being used by PDG since the 1980s, well before the GMS Dental acquisition. (Romriell Depo. at 34.)

That noncompete agreements are enforceable is well understood by PDG shareholders. When Dr. David Porter Sutton, PDG's founder and long-time president, the individual who signed the Management Agreement for PDG, left PDG in 2003 he went into practice in Downey, Idaho—a location outside the 20 noncompete mile radius found the documents used by PDG for

⁵ Misner's practice included PDG employee dentist Larry Bybee. Misner and Bybee together came up with the idea of forming their new business, Valley Dental, a corporation doing business as "Kidds Dental" both in Pocatello and in Burley. (Bybee Depo. at 12-14, 22.)

almost twenty years. (Romriell Depo. at 36, 74-75.) Additionally, when Dr. Michaelson, a former PDG dentist left in the early 1990s, he practiced, as did Dr. Misner initially, 90 miles away in Burley. (Romriell Depo. at 32-33.) In contrast, when PDG attempted to unilaterally hire Dr. Dwight Romriell in the fall of 2003, its shareholders specifically omitted a noncompete in his employment agreement, also an admission they know such agreements are enforceable. (Romriell Depo. at 77-78.)

As to Misner's contention that ISC is somehow engaging in the unlawful practice of dentistry by enforcing noncompetes, again Misner does not explain why he is entitled to retain the \$400,000 he received for entering into this supposedly unlawful arrangement. More important, ISC is not in any way controlling Misner's practice of dentistry. ISC is not, by enforcing Misner's noncompete, controlling *how* he practices dentistry, only *where* he does so. The contract Misner signed in 1996 gives him two choices: to practice at the office managed by ISC or to practice more than 20 miles away. How he practices at either location is up to Misner. Moreover, notwithstanding Misner's stated disdain of "for-profit foreign corporations" managing dental practices, he and Bybee obtained financing for their new practice and entered into a management agreement with Orthodontic Centers of America, apparently a Delaware corporation based in Louisiana,⁶ and a company that like ISC hires the nonprofessional employees, leases the space and manages the practice. (Bybee Depo. at 12, 44-45.)⁷ Thus, Misner obtained \$400,000 from ISC and, after ISC developed the business, is obtaining

⁶ See Kaplan Reply Aff., Ex. 3.

⁷ Misner has not produced his agreement with Orthodontic Centers of America ("OCA"), but ISC would be extremely surprised if there was no noncompete obligation either to that company or to the new P.C. formed with OCA's funds.

additional funds from another "for-profit foreign corporation" based upon the business ISC developed. Misner's conduct speaks for itself.

ISC is entitled to a TRO enforcing the plain language of its Noncompete Agreement with Misner, an agreement Misner concedes he is violating. The only issue, then, is the balancing of the harms.

B. ISC Has Shown a High Likelihood of Irreparable Injury—Misner Has Shown No Corresponding Hardship

Section 2 of Misner's Non-Compete Agreement⁸ specifically provides that Misner "agrees the remedy at law for any breach of such covenant [not to compete] or any of the related covenants set forth herein would be inadequate" and that ISC therefore "shall be entitled to injunctive relief thereon in addition to its rights to monetary damages. The Agreement notes that in addition to the damage to the business Misner's competition would do, Misner has had access to ISC's trade secrets. (*Id.*) This concern seems particularly pertinent where Misner has taken his knowledge of ISC's business and signed up with another practice management company to work just down the street.

As shown above, ISC's injury is the inevitable result of having to manage the Pocatello practice in the face of Misner's competition and covering its expenses minus the million dollars plus of revenue Misner was producing. This injury may be fatal to ISC's business in Pocatello. In addition to his statement that Dr. Misner's conduct has been "absolutely devastating" to ISC's business, PDG's president, Dr. Romriell, agreed that ISC has been losing money at its Pocatello office since Dr. Misner left in March 2004. (Romriell Depo. at 55, 99.) Misner's practice

⁸ Affidavit of Kevin Webb in Support of Defendant/Third Party Plaintiff's Motion for a Temporary Restraining Order (Misner Noncompete) Exhibit 1 at 3.

(including Bybee) generated between \$1.3 million and \$1.7 million in annual revenues for the 2001 through 2003 period. (Bybee depo. at 34.)

The practice managed by ISC has already lost over a hundred patients to Misner and stands to lose many more. Misner and Bybee leased their office space in March 2004, started requesting patient record transfers in April and saw their first patient on June 11. (Bybee Depo. at 11-13.) Thirteen of the fourteen employees in Misner's office are former ISC employees. (Bybee Depo. at 18-20.) In the two weeks prior to June 25, 2004 Misner and Bybee had seen 150 patients and they expect shortly to be at a level of seeing 480 patients per week. (Bybee Depo. at 27-29.) Bybee estimates and expects that 60 percent of the patients he and Misner will treat will be former PDG patients. (Bybee Depo. at 26-27, 30.) In fact, Bybee's estimate is probably a conservative one, at least with regard to the losses to the PDG practice. When Dr. Sutton left PDG, the practice lost 90 percent of his patients. (Romriell Depo. at 40.)

Misner and Bybee translated these patient numbers into dollars in order to obtain financing. They estimated first-year revenues of \$1.1 million, 80 percent of which will be from the Pocatello office at which Misner is working in violation of his noncompete agreement. (Bybee Depo. at 25-26.) Misner and Bybee estimated, for the purposes of their bank loan, that their revenues will increase over time to \$1.4 million. (Bybee Depo. at 26.)

In contrast to ISC's loss of millions of dollars from its approximately 62 percent of the revenue Misner's practice was generating, Misner has shown no harm to himself or to the public from the issuance of the TRO. Misner initially treated patients in Burley after leaving PDG—indeed he had apparently been seeing patients in Burley as a sideline even while working at PDG (in violation of his employment agreement with PDG.) (Romriell Depo. at 59.) Upon the issuance of the TRO, Misner can simply return to practicing in Burley (or return to PDG). There

are numerous other family dentists and pcdiadontists such as Dr. Misner in the Pocatello area (Romriell Depo. at 23-28), so basing his practice in Burley will produce no harm to the public.

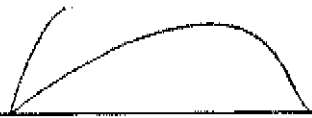
Because Misner has offered no evidence of any harm should the TRO be issued, ISC should not be required to post a bond or, at most, post a very small bond upon the issuance of the TRO. Given that ISC has shown both a high likelihood of success on the merits and irreparable injury, there is no question a TRO should issue.

III. CONCLUSION

ISC's motion should be granted. Because Misner offers no evidence of any harm from the TRO, ISC should not have to put up a bond or, failing that, a bond at a very low level.

DATED: June 28, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2004, I caused to be served a true copy of the foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER** upon the following:

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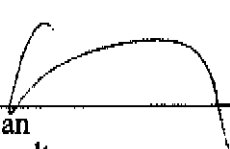
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DEFENDANT/THIRD-PARTY PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF
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NONCOMPETE) - 11